

JALLI (Migration) [2018] AATA 5699 (14 December 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Gangadhara Jalli

CASE NUMBER: 1715133

HOME AFFAIRS REFERENCE(S): BCC2016/143037

MEMBER: Moira Brophy

DATE: 14 December 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations

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Statement

made on 14 December 2018 at 10:52am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – joint bank account statements – lived together since they married – care for their child together – credible witnesses – decision under review remitted

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LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 11 January 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the visa applicant was in a genuine and continuing relationship with her sponsor.
5. The applicant, Mr Gagadhara Jalli appeared before the Tribunal on 11 December 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Shailaja Valmiki.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Background

8. The visa applicant is a 40 year old male currently residing in Sydney. He has declared no previous relationships. His parents and two sisters reside in India.
9. The sponsor Ms Shailaja Valmiki is a 36 year old female living in Sydney. She has declared one previous marriage in the period from 10 May 2008 to 21 March 2009. Ms Valmiki's parents and two sisters reside in India.
10. At the time of application the parties stated they had met on 16 July 2014 in Hyderabad, India and had become engaged on 22 August 2014. They were married on 26 November 2015. Their application for a Partner visa was lodged on 11 January 2016. Their first child, a son was born on 29 October 2017

Tribunal Proceedings

11. The issue in the present case is whether the visa applicant and the sponsor were in a genuine and continuing relationship at the time of application and continue to be in a genuine and continuing relationship at the time of this decision.
12. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the visa applicant and sponsor at the hearing.

13. The parties gave consistent and coherent oral evidence about the circumstances in which they met the development of their relationship and their current living arrangements. The Tribunal found them to be credible and was satisfied it could rely on their evidence in making findings of fact.
14. The Tribunal accepts the parties' oral evidence that they met by arrangement in accordance with their custom informed their parents they would like to take the relationship further. They become engaged on 22 August 2014. They were married on 26 November 2015. Their first child, a son was born on 29 October 2017. The visa applicant came to Australia on 19 December 2015 on a Visitor visa and they have lived together since that time. Their application for a Partner visa was lodged on 11 January 2016.

Whether the parties are in a spouse or de facto relationship

15. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 26 November 2015 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

18. Financial

19. The parties live in rented accommodation. They are in a 2 bedroom unit for which they pay \$540 per week. They have lived there since July 2017. The residential tenancy agreement is in both their names and the utilities are in the name of the sponsor alone. Prior to living in this unit they lived with relatives in the same apartment block. The visa applicant is currently employed by a company based in New York. He has worked for this company as an audio visual consultant for many years. He was previously required to travel a lot with his work but since marrying and having a child he has requested he not be required to travel as much. He is currently working from home and is paid between \$1500 and \$2000 per month. He is paid into an account he has with an Indian bank. The sponsor has recently commenced full time work. She is employed in a contract role at \$35 per hour. Her pay is paid into an account in her name.

20. Statements for the account in joint names and for the visa applicant's name were provided to the Tribunal for the past two years. The statements show regular household expenditure in terms of rent from the joint account, food and other everyday costs were also paid from that account. There is clear evidence of the applicant transferring money into that account on a regular basis. The parties gave consistent evidence that the applicant manages their financial affairs as is their custom. The sponsor sees it as her role to contribute on an equal basis to their everyday costs. Both parties are able to access the joint account. The parties do not have credit cards. Both parties were conscious of saving for a house deposit. Since the visa applicant has been receiving FTB for her son she has put that money into a savings account for his future needs.

21. The Tribunal accepts from the evidence of the party and the bank records provided that the parties pool their financial resources and share household expenditure. The Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine spousal relationship.

22. *Nature of the household*

23. The Tribunal accepts the parties have lived together since they married in November 2015. After they were married they lived with other family members but since July 2017 they have lived on their own at the unit where they now reside.

24. The parties provided consistent and convincing evidence regarding the arrangements for their household. The visa applicant is responsible for the majority of the household chores but the sponsor assists when he is able. The visa applicant does most of the cooking but both parties do the grocery shopping. The arrangement of the chores is mainly determined by their work schedules.

25. Their son is cared for by the applicant while the sponsor is at work. He manages his work around the baby's schedule. When the sponsor returns home from work she takes over the care of their son and the applicant works. Because much of his work is dealing with clients in different time zones he is able to accommodate both his son's needs and those of his clients. Each morning and afternoon he drives the sponsor to her workplace with his son and they pick her up when she has finished work.

26. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.

27. *Social aspects of the relationship.*

28. The parties provided a number of statutory declarations from friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.

29. As noted above the Tribunal found the oral evidence provided by the parties to be clear and persuasive evidence that the parties have been in a loving couple relationship for four years and that they provide one another with considerable support.

30. The parties provided documentary evidence to support their oral evidence at the hearing that since they came to Australia the sponsor was travelling extensively with his work. The sponsor was on her own a lot initially. When this was considered along with the demands of being new parents they realistically have not had a lot of time to socialise.

31. On the basis of the oral evidence of the parties and the evidence provided by way of photographs the Tribunal finds that the relationship between the visa applicant and his

sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the parties represent themselves as being married to one another to their family, friends and the wider community.

32. *Nature of the person's commitment to each other.*

33. The Tribunal finds that the visa applicant and his sponsor have been in a committed relationship since they met in 2014. They have lived together continuously since their marriage in November 2015.
34. The decision to have a family together indicates a significant commitment to the relationship by both the visa applicant and his sponsor. The visa applicant gave evidence at the hearing of their excitement when their son was born and of their plans for his future. It was readily apparent that their son is a significant part of their family and both parties were committed to ensuring he was an integral part of their family plans.
35. The Tribunal has had the advantage of being able to observe the parties together at the hearing. Their emotional support for each other and companionship was readily apparent. They presented as a couple who loved and respected each other and who were devoted to their son.
36. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future plans was consistent. The Tribunal was satisfied that the visa applicant and his partner were committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuous relationship.

37. **CONCLUSION**

38. The Tribunal has had the benefit of receiving oral evidence in person from the parties as well as seeing the parties interact with each other. It has also received a considerable amount of additional information such as bank statements and evidence that was not before the delegate. The Tribunal accepts the parties were inexperienced and that led to their not understanding the type of documentation required by the original decision maker.
39. Given these findings the Tribunal is satisfied that at the time of application and at the time of this decision the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.
40. Accordingly the Tribunal finds that the applicant satisfies the definition of spouse in s. 5F(2)(a)-(d) and the parties are in a spousal relationship.
41. The Tribunal is satisfied that the parties were in a genuine spousal relationship at the time of application and continue to be in a genuine and continuing relationship at the time of decision.
42. Mr Jalli is not the holder of a Subclass 771 (Transit) visa. The Tribunal finds that Mr Jalli is the spouse of Ms Valmiki, who is an Australian citizen as evidenced by a copy of her passport, and is not prohibited from being a sponsoring partner. Accordingly the Tribunal finds that the requirements of cl.820.211(2)(a)(i) and (ii) are met.

43. The Tribunal is satisfied that at the time of application Mr Jalli was sponsored by Ms Valmiki, who had turned 18, in accordance with cl.820.211(2)(c)(i), and that Mr Jalli held a substantive visa at the time of application, so cl.820.211(2)(d) is not applicable.
44. As the requirements of cl.820.211(2) are met, the Tribunal finds that cl.820.211 is satisfied.
45. The Tribunal further finds that at the time of the Tribunal's decision Mr Jalli continues to be Ms Valmiki's spouse, and continues to meet the requirements in cl.820.211(2), thus satisfying cl.820.221(1).
46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

47. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).